

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE,
INC., a Delaware corporation,

Plaintiff,

v.

ZILLOW, INC., a Washington
corporation; ZILLOW GROUP, INC., a
Washington corporation; ZILLOW
HOMES, INC., a Delaware corporation;
ZILLOW LISTING SERVICES, INC., a
Washington corporation; TRULIA, LLC,
a Delaware limited liability company; and
THE NATIONAL ASSOCIATION OF
REALTORS, an Illinois trade
association,

Defendants.

CASE NO. 2:21-cv-00312

**ORDER REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION**

The following provisions will govern the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate

1 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
2 contributes to the risk of sanctions.

3 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P.
4 26(b)(1) must be applied in each case when formulating a discovery plan. To further the
5 application of the proportionality standard in discovery, requests for production of ESI and related
6 responses should be reasonably targeted, clear, and as specific as possible.

7 **B. ESI Disclosures**

8 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
9 party shall disclose:

10 1. Custodians.

11 The parties shall identify up to 5 custodians most likely to have discoverable ESI in
12 their possession, custody, or control.

13 The custodians shall be identified by name, title, connection to the instant litigation, and the type
14 of the information under the custodian's control. The parties agree to meet and confer regarding
15 any requests for additional custodians.

16 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
17 drives, servers), if any, likely to contain discoverable ESI.

18 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
19 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
20 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
21 information stored in the third-party data source.

1 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
2 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
3 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

4 **C. ESI Discovery Procedures**

5 1. On-site inspection of electronic media. Such an inspection shall not be required
6 absent a demonstration by the requesting party of specific need and good cause or by agreement
7 of the parties.

8 2. Search methodology. The parties shall timely meet and confer and cooperate in
9 good faith to attempt to reach agreement on appropriate search terms and queries, file type and
10 date restrictions, data sources (including custodians), and other appropriate computer- or
11 technology-aided methodologies, before any such effort is undertaken. The parties shall continue
12 to cooperate in good faith to revise the appropriateness of the search methodology. The parties
13 shall not delay implementing the agreed upon searches and related production while seeking
14 resolution on others.

15 a. Prior to running searches:

16 i. The producing party shall disclose the data sources (including
17 custodians), search terms and queries, any file type and date restrictions, and any other
18 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
19 information. The producing party may provide unique hit counts for each search query.

20 ii. The requesting party is entitled to, within 14 days of the producing
21 party's disclosure, add no more than 10 search terms or queries to those disclosed by the
22 producing party absent a showing of good cause or agreement of the parties.

1 iii. The following provisions apply to search terms / queries of the
2 requesting party. Focused terms and queries should be employed; broad terms or queries, such
3 as product and company names, generally should be avoided. A conjunctive combination of
4 multiple words or phrases (*e.g.*, “computer” and “system”) narrows the search and shall count as
5 a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, “computer”
6 or “system”) broadens the search, and thus each word or phrase shall count as a separate search
7 term unless they are variants of the same word. The producing party may identify each search
8 term or query returning overbroad results demonstrating the overbroad results and a counter
9 proposal correcting the overbroad search or query. A search that returns more than 5,000 unique
10 documents, excluding families, is presumed to be overbroad.

11 b. After production: Within 21 days of the producing party notifying the
12 receiving party that it has substantially completed the production of documents responsive to a
13 request, the responding party may request no more than 10 additional search terms or queries.
14 The immediately preceding section (Section C(2)(a)(iii)) applies.

15 3. Format.

16 a. The parties shall produce their information in the following format: single-
17 page TIFF and/or JPG images and associated multi-page text files containing extracted text or
18 with appropriate software load files containing all information required by the litigation support
19 system used by the receiving party.

20 b. Unless otherwise agreed to by the parties, files that are not easily converted
21 to image format, such as spreadsheet, database, and drawing files, will be produced in native
22 format. A requesting party may request that a producing party reproduce particular documents in
23 native format if the documents are not reasonably legible after being converted to image format.

1 c. Each document image file shall be named with a unique number (Bates
2 Number). File names should not be more than twenty characters long or contain spaces. When a
3 text-searchable image file is produced, the producing party must preserve the integrity of the
4 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
5 the revision history.

6 d. If a document is more than one page, the unitization of the document and
7 any attachments and/or affixed notes shall be maintained as they existed in the original document.

8 e. The full text of each electronic document shall be extracted (“Extracted
9 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
10 format (or Unicode text format if the text is in a foreign language) and shall be named with a
11 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
12 production version of the document followed by its file extension).

13 4. De-duplication. The parties may de-duplicate their ESI production across custodial
14 and non-custodial data sources, provided the duplicate custodian information removed during the
15 de-duplication process tracked in a duplicate/other custodian field in the database load file.

16 5. Email Threading & TAR. The parties may use analytics technology to identify
17 email threads and need only produce the unique most inclusive copy and related family members
18 and may exclude lesser inclusive copies. Upon reasonable request, the producing party will
19 produce a less inclusive copy. If necessary to obtain information that is not otherwise available
20 in a threaded e-mail production (*e.g.*, an e-mail attachment), the producing party will produce a
21 less inclusive copy. A producing party may also employ additional TAR tools and approaches as
22 it deems appropriate, provided the TAR search parameters are disclosed to all parties.

1 6. Metadata fields. The parties agree that only the following metadata fields need be
2 produced, and only to the extent it is reasonably accessible and non-privileged: document type;
3 custodian and duplicate custodians (or storage location if no custodian); author/from; recipient/to,
4 cc and bcc; title/subject; email subject; file name; file size; file extension; original file path; date
5 and time created, sent, modified and/or received; and hash value. The list of metadata type is
6 intended to be flexible and may be changed by agreement of the parties, particularly in light of
7 advances and changes in technology, vendor, and business practices.

8 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
9 electronic format, the production of hard-copy documents will include a cross-reference file that
10 indicates document breaks and sets forth the custodian or custodian/location associated with each
11 produced document. Hard-copy documents will be scanned using Optical Character Recognition
12 technology and searchable ASCII text files will be produced (or Unicode text format if the text is
13 in a foreign language), unless the producing party can show that the cost would outweigh the
14 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning
15 and will not result in accurate or reasonably useable/searchable ESI). Each file will be named
16 with a unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
17 production version of the document followed by its file extension).

18 **D. Preservation of ESI**

19 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
20 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
21 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
22 as follows:

1 1. Absent a showing of good cause by the requesting party, the parties shall not be
2 required to modify the procedures used by them in the ordinary course of business to back-up and
3 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
4 possession, custody, or control.

5 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
6 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
7 where that data is created after a disclosure or response is made (unless excluded under Sections
8 (D)(3) or (E)(1)-(2)).

9 3. Absent a showing of good cause by the requesting party, the following categories
10 of ESI need not be preserved:

- 11 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 12 b. Random access memory (RAM), temporary files, or other ephemeral data
13 that are difficult to preserve without disabling the operating system.
- 14 c. On-line access data such as temporary internet files, history, cache,
15 cookies, and the like.
- 16 d. Data in metadata fields that are frequently updated automatically, such as
17 last-opened dates (see also Section (E)(5)).
- 18 e. Back-up data that are duplicative of data that are more accessible
19 elsewhere.
- 20 f. Server, system or network logs.
- 21 g. Data remaining from systems no longer in use that is unintelligible on the
22 systems in use.
- 23 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
24 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
25 a copy of all such electronic data is automatically saved in real time
26 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
 storage).
- i. Text messages.
- j. Personal social media postings or accounts of employees of any party and

1 social media postings for accounts owned or maintained by a party that
2 are publicly available.

3 **E. Privilege**

4 1. A producing party shall create a categorical privilege log of all documents fully
5 withheld from production on the basis of a privilege or protection, unless otherwise agreed or
6 excepted by this Agreement and Order. Privilege logs shall include (i) a description of the nature
7 or general subject matter of the documents or communications for each category included on the
8 privilege log sufficient to support the claim that the documents within the category are privileged
9 and/or protected; (ii) the date of the earliest document and the date of the most recent document
10 in each category; (iii) a list of the unique author(s)/sender(s) and recipient(s) for the documents
11 in each category that identifies the persons who are attorneys; and (iv) the total number of
12 documents withheld that fall into each category. Privilege logs will be produced to all other
13 parties no later than 30 days before the deadline for filing motions related to discovery unless an
14 earlier deadline is agreed to by the parties.

15 2. Redactions need not be logged so long as the basis for the redaction is clear on the
16 redacted document.

17 3. With respect to privileged or work-product information generated after the filing
18 of the complaint, parties are not required to include any such information in privilege logs.

19 4. Activities undertaken in compliance with the duty to preserve information are
20 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B) and need not
21 be included in privilege logs.

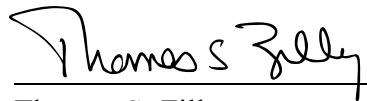
22 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents or information
23 in this proceeding shall not, for the purposes of this proceeding or any other federal or state
24 proceeding, constitute a waiver by the producing party of any privilege applicable to those

documents, including the attorney-client privilege, attorney work-product protection, or any other privilege or protection recognized by law. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection.

ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: January 19, 2022



Thomas S. Zilly
United States District Judge